95-1509

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

DOUGLAS W. LUZIK, *et al.*,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The Virginia Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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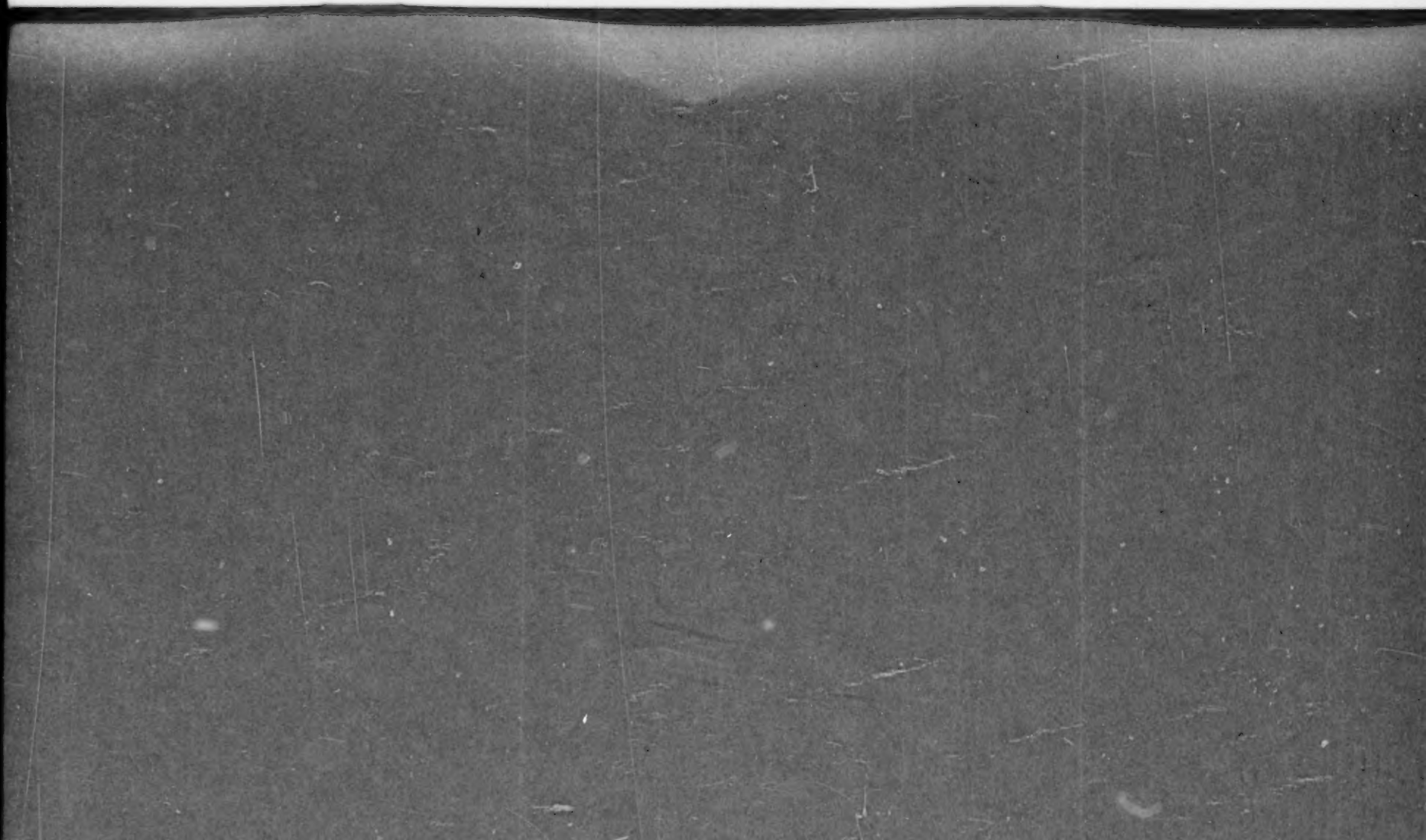

QUESTIONS PRESENTED

I. Whether this Court should grant certiorari in this case to resolve a split in the Federal Circuits on the issue of disciplinary deductions under the salary basis test, when the facts and findings in the instant case do not lend themselves to resolving that issue.

II. Whether this Court should grant certiorari in this case where the trial court correctly applied the law regarding the "administrative" exemption to facts unique to this case, and unique to Virginia.

III. Whether this Court should grant certiorari in this case where the trial court correctly applied the law regarding the "professional" exemption to facts unique to this case, and unique to Virginia.

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STATEMENT OF THE CASE

This was a chancery action for an accounting, brought in Virginia Circuit Court, on behalf of 103 juvenile probation officers ("JPOs"). They asserted that the Commonwealth failed to pay them additional compensation beyond their base salary for hours that they had worked in excess of 40 in any given week, thereby violating the Fair Labor Standards Act ("FLSA" or "the Act"). 29 U.S.C. § 541. The case proceeded to trial on November 21 and 23, 1994.

The trial court's May 5, 1995, letter opinion succinctly sets out most, but not all, of the salient facts. In relevant part, the trial court found that: the work of the JPOs constitutes an application of Juvenile & Domestic Relations District Courts' ("juvenile courts") policies, and is of substantial importance to the court system and the juveniles who come into contact with it (App. 9a); every decision the JPOs make is an implementation of the juvenile court's policies (App. 9a); the JPO's duties impact on the courts' dockets and help expedite the functioning of the juvenile justice system (App. 9a); "running" a court's business "is essentially docket management and case resolution" (App. 9a); and each petitioner is critical to docket management. (App. 9a).

In addition, the court also found that: the work JPOs perform is "predominately intellectual and varied in character" (App. 11a); they must be able to analyze and interpret information (App. 11a); the JPO is constantly presented with different facts and circumstances that must be weighed to assess and make recommendations (App. 11a-12a); in order to do their job, JPOs must have

knowledge of subjects such as normal and abnormal psychology, child development, sociology, child delinquency and the Virginia Code (App. 12a); all the JPOs here hold college degrees, and 88% of their degrees are in a related social science field (App. 12a); individuals with related degrees have a competitive edge over other applicants (App. 12a); and there is selective hiring of individuals with degrees in related fields for the position of JPO. (App. 12a).

The trial court also found that: none of the petitioners had received a reduction in pay of less than a full work week for a disciplinary suspension, of any kind (App. 5a & 6a); the only testimony regarding the duration and scope of any actual disciplinary deduction from pay for non-safety reasons was offered by Earl McFarland, a JPO who had been suspended in 1983 – this occurred at a time when the Act did not even apply to the states (App. 5a & 6a). Based on the evidence before it, the trial court concluded that "the fact the Commonwealth had a disciplinary rule in place that 'subjected' the juvenile probation officers to a potential pay reduction does not destroy their salaried status absent evidence that a reduction actually occurred." (App. 7a).

The "disciplinary rule" that the petitioners make much of here was never introduced into evidence and the primary witness called by petitioners to establish the existence of this policy testified that he was unaware how, if at all, the state's broad policy would have been

implemented by the JPOs' agency in question. (Res. App. 32, Vol. II, pp. 34-35).[1]

ARGUMENT

In a two-pronged argument, the JPOs argue that this Court should exercise jurisdiction of this case because the decision below adopts a broad reading of FLSA exemptions, thereby (1) intensifying a severe and confusing split among the Federal Circuits and States; and (2) erroneously applying federal law. The factual predicate for their first argument does not exist in the record below; the second argument is factually incorrect. For these reasons, this Court should not grant certiorari.

I. THIS CASE IS INAPPROPRIATE TO RESOLVE A SPLIT THAT MAY EXIST AMONG THE FEDERAL CIRCUIT COURTS OF APPEAL AND VIRGINIA

The petitioners' first argument is that the decision of the trial court contributes to a split in authority among the Federal Circuits, and as between those circuits and Virginia, regarding treatment of the "disciplinary rule" of the salary basis test; as well as a split on the requirements of the "administrative" and "professional" exemptions of the FLSA.

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[1] References to materials found in the Respondents' Appendix are marked as (Res. App. ___) and attached to this brief. References to pages of the trial transcript bear the additional citation to the volume and page of the transcript. (Res. App.___, Vol.___, pp.___).

A. The Salary Basis – Disciplinary Docking Rule Split

The federal courts admittedly have split as to whether so-called "theoretical" reductions in pay destroy the salary basis of an otherwise exempt employee.[2] As petitioners point out, the trial court below noted the split in authority. However, the trial court's finding, upon which petitioners rely to set up this issue, is a figment of their imagination. The finding in question only states:

> "[the] fact that the Commonwealth had a disciplinary rule in place that "subjected" the juvenile probation officers to a potential pay reduction does not destroy their salaried status absent evidence that a reduction actually occurred."

(App. 7a). The trial court's findings never differentiated between a disciplinary rule that allowed deductions from pay for major safety violations, which would be authorized under the salary basis test, and a disciplinary rule that resulted in deductions for non-safety violations, which would not. The trial court made no findings or rulings on the type of deductions that could be imposed by the state's disciplinary policy. In fact, the trial court never specifically found that the "disciplinary rule" in question even potentially authorized an *improper* deduction for "non-safety" violations.

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[2] The cases that petitioners cite to demonstrate a split, not only deal with reductions in pay for less than a full work-week for non-safety rule violations, but also reductions in pay for periods of less than a full work day arising from absences by an employee for personal reasons.

At trial, the testimony of the Accounting Manager for the Department of Youth and Family Services ("DYFS") established that he had reviewed the actual records for each petitioner and determined that none had suffered *any* reduction in pay because they had been suspended from work for a period of less than a full work week. (App. 6a). Additionally, though petitioners attempted to have the Commonwealth's Compensation Director testify that JPOs might in theory be disciplined in a manner unauthorized by the FLSA, he testified that each agency implements policy guidelines that the Department of Personnel & Training establishes; he "just didn't know" whether any individual [JPOs] are, in point of fact, even theoretically subject to being disciplined by a suspension without pay. (Res. App. 32, Vol. II, pp. 34-35). In fact, the state policy alluded to, and to which petitioners attach such great emphasis as the offending "disciplinary rule," was never introduced at the trial of this cause.

Once the respondents fulfilled their burden of establishing that the petitioners met the salary basis test, it was up to the petitioners to establish the existence of an unauthorized deduction from pay, or, consistent with the theoretical deduction cases, a policy permitting an unauthorized deduction. The only testimony at trial that any deduction had been made came from the petitioner Earl McFarland who had been suspended in 1983. This occurred, however, 11 years prior to trial when the Act did not apply to the states (App. 5a & 6a);[3] and at a time when the Department of Youth and Family Services had

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[3] *See Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985).

not yet been established. (Res. App. 29, Vol. II, p. 122); *See also* Va. Code § 66-1. Based on the evidence before it, the trial court reasonably concluded that the respondents had met their burden under the salary basis test.

Even more significant, the court did not find, as petitioners urge, that the disciplinary rule at issue even subjected them to "a disciplinary reduction in pay *of less than one work week for a non-safety related infraction.*" Petitioners' Brief at 4. (Emphasis added). The trial court's ambiguous finding that the Commonwealth's disciplinary rule "subjected" the petitioners to a potential pay reduction, without more, cannot be bootstrapped into a ruling that warrants review by this Court in order to resolve any "split in authority" among the Federal Circuits on this issue.[4]

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[4] The petitioners appear to raise another issue in their brief. That issue relates to the docking of pay of an employee for their attendance at trial as a witness. *See* Question Presented No. 1, Page i, and Page 9 of Petitioners' Brief. This matter came up in the trial court when Douglas Luzik, the lead petitioner in this case, chose to attend the trial of this cause in his capacity as a party. Petitioners seem to suggest, without more, that this is unauthorized under the FLSA, and constitutes grounds for this Court's review. We note that the trial court held that Mr. Luzik "had enough annual leave to cover his absence." (App. 7a); *See also Shockley v. City of Newport News*, 997 F.2d 18, 24 (4th Cir. 1993). Respondents believe that petitioners appear to have relinquished this issue by failing to cite to any facts showing an unauthorized docking, nor citing any authority to support such a claim.

B. The Juvenile Probation Officer Administrative Exemption Split

The petitioners attempt to paint the decision of the trial court, determining that these JPOs were administratively exempt, as an aberration. They contend the decision is in conflict with decisions from other courts dealing with juvenile probation officers and in conflict with Department of Labor (DOL) rulings.

As this case amply demonstrates, however, a determination whether a particular job qualifies for one of the exemptions is a very fact specific inquiry. Unfortunately for the petitioners, the trial court decided the facts adversely to them.

Petitioners argue that this Court should simply borrow the rulings finding probation officers not administratively exempt in *Bratt v. County of Los Angeles*, 912 F.2d 1066 (9th Cir. 1990), *cert. denied*, 498 U.S. 1086 (1991), and *Jones and Associates, Inc. v. District of Columbia*, 642 A. 2d 130, 134 (D.C.App. 1994). Failure to do so, they argue, results in a split in authority and pits the Virginia courts against other jurisdictions. *Bratt* and *Jones and Associates, Inc.*, however, involved different employees, with dissimilar duties, in different locales, following different state laws and policies.[5] Significantly, the *Bratt* court

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[5] Petitioners engage in hyperbole when they suggest that the trial court's decision here rejects the legal holdings in *Shockley*, *Bratt*, and *Jones and Associates, Inc.*, and is binding on every other Circuit Court in Virginia that considers an FLSA claim. The fact driven decision here has little binding precedential value on other judges in the Circuit Court of the City of Richmond, let alone on other Circuit Courts across the Commonwealth.

characterized the Los Angeles probation officers as mere "information gatherers" – supposedly all they did was conduct factual investigations and make recommendations. *Id.* at 1069. The evidence in this case was far different.

This case is also distinguishable from *Bratt* and *Jones and Associates, Inc.* because of the applicability of several sections of the Code of Virginia to the instant case. These provisions help to instruct that JPOs meet the administrative exemption. Pursuant to Va. Code § 16.1-233,

> Within funds appropriated for the purpose, it shall be a function of the Department to develop and operate . . . probation and other court services **for juvenile and domestic relations district courts**. . . . (Emphasis added).

Similarly, Va. Code § 16.1-235 provides that "The Department shall develop and operate probation and related court services. . . . **and make such services available to juvenile and domestic relations district courts** . . . (Emphasis added). *See also* Va. Code §§ 16.1-234; 16.1-233(d). These statutes clearly show that the petitioners provide their services directly to the courts, and only indirectly to those juveniles and families coming before the courts.

Petitioners also cite to the DOL's opinion letters of February 16, 1988 (App. 63a-66a), April 12, 1988 (App. 66a-69a), and May 9, 1988 (App. 70a-73a), finding that juvenile and adult probation officers of certain unidentified public employers did not qualify for exemption as

administrative employees.[6] This Court cannot gain any insight, however, by looking to a letter opinion which does not follow from a set of facts unique to Virginia. Moreover, this Court has previously held that opinion letters issued under the FLSA are not "conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy." *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944). Further, opinion letters are not binding on the courts. *Schultz v. Hartin & Son*, 428 F.2d 186, 191 (4th Cir. 1970). Even DOL cannot reach consistent results given the many configurations of employment duties. In an earlier opinion letter, issued on October 8, 1974, DOL opined that deputy probation officers **were exempt** as administrative employees. (Res. App. 33). Contradictory opinions illustrate all the more reason why the DOL letters petitioners cite are not controlling.

The JPOs here impact directly on the court's management of its docket and the policies it establishes to conduct its business. Neither of these conclusions can be gleaned from the decisions in the cases cited by petitioners. The ruling in the trial court was a fact driven determination that the petitioners were administratively exempt. The evidence clearly justified such a conclusion. Petitioners' assertion that the instant case was decided in the face of contrary decisions and rulings, and therefore creates a split of authority on this issue is plainly inaccurate. The trial court made a determination against the

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[6] The May 9, 1988, letter cited by petitioners, deals with a "Child Protective Investigator II." The job requirements and duties there are totally different from the instant case.

petitioners. Petitioners cannot elevate this decision beyond its facts to warrant review by this Court.

C. The Professional Exemption Split

Petitioners open their argument on this issue by commenting that "Judge Markow is the first judge to ever rule that being a juvenile probation officer in a position which does not require any college degree is a profession. . . . " Petitioners' comment is premised on the contention that the respondents did not have any "formal" requirement of a degree for an individual to be hired as a JPO.[7] What petitioners fail to mention, however, is that every petitioner here had a degree, and that 88% of them had degrees in a related field of social science. (App. 12a). In addition, the respondents presented testimony from the Employment Manager for DYFS that all but one of the petitioners had related "experience" in addition to a degree at the time they were hired.[8]

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[7] Significantly, the petitioners' position descriptions introduced at trial concede the necessity of a specialized degree. In response to the question, "List what you consider to be the qualifications for entry into this position," the petitioners typically acknowledged in Part III, Section 18, Sub-Section C, that a degree in human services, social sciences, criminal justice or related fields was required. Petitioners cannot now contend that DYFS does not have such a requirement.

[8] The Employment Manager could not provide further information about the one exception, because the individual's personnel file was incomplete and the local director who had hired the individual was deceased. (Res. App. 29-30, Vol. II, p. 123).

Petitioners, in seeking to create another "split" to justify review here, take pains to ignore the DOL regulations that guided the trial court's inquiry. Those regulations state that exempt "professional" employees include those in traditional professions such as law and medicine, as well as those in "various types of physical . . . and biological sciences." 29 C.F.R. § 541.302. Computer analysts, programmers, and software engineers are similarly exempt professionals. *Id.* at § 541.303. Whereas an appropriate academic degree is *prima facie* evidence of the possession of professional training, an advanced degree is not a prerequisite for this exemption to apply. *Id.* at § 541.302(d). The employees' actual duties and qualifications determine the exemption, rather than the mere holding of a professional title. *Id.* at § 541.304(a). The regulations define knowledge of an "advanced type" as that which cannot be obtained at the high school level. *Id.* at § 541.302(b).

DOL regulations further define what type of work qualifies for the professional exemption. It must be work that is "predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work." *Id.* at § 541.306(a). The employee must not only take information, he or she must interpret the data. *Id.* Finally, "the areas in which professional exemptions may be available are expanding as knowledge is developed, academic training is broadened, and degrees are offered in new and diverse fields." *Id.* at § 541.302(e)(2).

Petitioners cite to three cases from foreign jurisdictions to try and prove the point that "probation officers" cannot be professionals, and to establish a "split" in

authority. *Dybach v. Fla. Dep't of Corr.*, 942 F.2d 1562 (11th Cir. 1991); *Mills v. Maine*, 839 F. Supp. 3 (D. Maine 1993); and *McIntyre v. Youth Rehabilitation Services*, 795 F. Supp. 668 (D.Del. 1993). *Dybach* and *Mills* are contradictory, and *McIntyre* simply has no application here.[9] In *Dybach* the court found that a Bachelor of Arts in criminal justice constituted a "specialized field." *Dybach* at 1565. The court noted, however, that the personnel director for the Department of Corrections testified that the position could have been filled by someone with a degree "in basket weaving." *Id.* at 1565. In addition, the particular job duties the plaintiff was performing demonstrated that she was not employed in a professional "capacity." *Id.* at 1565. On the other hand, in *Mills* the court found such a degree insufficient. Again, it is clear that the primary responsibilities of the probation officers in the cited cases were significantly different from those exercised by the petitioners here.

Petitioners totally ignore the one Federal case that is most similar to this one, and which is totally consistent with the trial court's conclusion. That decision – a case petitioners' own counsel litigated – is the Alexandria, Virginia federal court decision in *Hicks v. City of Alexandria*, C/A No. 92-354-A (E.D. Va., March 31, 1993).[10] *Hicks* is important because the court there found that Alexandria's Social Workers I and II qualified as "professionals." The *Hicks* court found that Alexandria's Social

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[9] *McIntyre* deals with a probation officer and on-call duties, not with the requirements for the professional exemption.

[10] The *Hicks* Opinion is unreported and is reproduced and attached to this Brief at Res. App. 1-28.

Workers were required to have advanced knowledge and training in the social sciences. The *Hicks* evidence showed that Social Worker IIs require a "knowledge of normal and abnormal psychology, child development, mental retardation, social problems, therapeutic treatment techniques, alcoholism, child delinquency, drug addiction, theories of human behavior, knowledge of group behavior and knowledge of literature in the field of social work." *Hicks, slip op.* (Res. App. 24).

The *Hicks* court also found that since August of 1990, Alexandria had required that any newly hired Social Worker possess a baccalaureate degree in the field of Human Services, **or a baccalaureate degree in any field plus a minimum of two years experience in an area related to Human Services**. Of the six plaintiff Social Workers in that case, all but one had such a degree. The sole exception had other relevant experience. *Hicks, slip op.* (Res. App. 25).

Finally, the *Hicks* court determined that Alexandria's Social Workers were engaged in such duties as "providing counseling and therapy to individuals and families, providing social assessments, crisis intervention. . . . " *Hicks, slip op.* (Res. App. 23).

At trial in the instant case, the Director of the Alexandria Court Services Unit, of which Douglas Luzik and several other petitioners were employees, testified that Alexandria's Social Workers perform fundamentally the same type of work, and have the same type of knowledge and background as her JPOs. (Res. App. 30-32, Vol. III, p. 148-150). The trial court here specifically found that each

of the JPOs required knowledge of several areas, including normal and abnormal psychology, child development, sociology, child delinquency, and the Virginia Code. (App. 12a).

Despite petitioners' recitation of things the trial court did not find, the record is replete with evidence establishing that JPOs qualify as professionally exempt. Petitioners are once again seeking to leverage a purely fact intensive inquiry and decision by the trial court into a split of authority. The evidence clearly does not establish that to be the case here, and should not form the basis for this Court's review of the decision.

In conclusion, contrary to the suggestion of the petitioners, certiorari review of this decision would not likely resolve any split in the Federal Circuits, nor resolve any "manufactured" split in the application of FLSA principles by the courts of Virginia and other courts.

II. THE DECISION BELOW DOES NOT CONTAIN ERRONEOUS INTERPRETATIONS OF IMPORTANT QUESTIONS OF FEDERAL LAW

The petitioners' second principal argument is that the decision of the trial court is erroneous in its interpretation of the disciplinary rule of the salary basis test, as well as in its treatment of the requirements of the administrative and professional exemptions to the FLSA.

A. Disciplinary Docking: Subject v. Actual

The petitioners contend that the trial court misinterpreted the requirements of the disciplinary rule. Petitioners contend that the court should have adopted the DOL's interpretation of the rule. Petitioners argue that since a disciplinary rule was in effect in the instant case, petitioners' compensation was "subject to" deductions, and therefore respondents failed the salary basis test.

Petitioners, however, mistake the trial court's application of the facts to the law in this case with a misinterpretation of the law. Petitioners once again take great pains to ignore the fact that they failed to meet their burden of proof. The disciplinary rule or policy that purportedly made the JPOs "subject to" deductions was never introduced at trial. Nor could petitioners' witness at trial state that it was even applied to petitioners. Further, the evidence established conclusively that no *unauthorized* deduction had been made of any JPOs' pay at a time when the FLSA applied to the Commonwealth of Virginia. Under the circumstances, the trial court could not have found a violation of the salary basis test. The trial court's ambiguous finding that a disciplinary rule existed that subjected the petitioners to a potential pay reduction, without more, does not give rise to a determination that unauthorized pay reductions could be made so as to defeat the salary basis test. This finding, and the court's application of the facts to the law, even assuming arguendo that it was improperly applied, does not justify review by this Court. Rule 10, Rules of United States Supreme Court.

B. Administrative Exemption: Day-To-Day Production Work

Petitioners also assert that the trial court interpreted the requirements of the administrative exemption too narrowly. They argue that the proper interpretation may be found in the *Bratt* and *Jones and Associates, Inc.* decisions as well as other rulings by the DOL.

Once again, the petitioners mistake the trial court's proper application of law to the facts with what they characterize as improper legal conclusions. That is just not right. The trial court rejected petitioners' narrowly framed analysis of the requirements of the administrative exemption in favor of one more reasonable and in conformity with the requirements of the DOL's regulations. The trial court reviewed the facts adduced at trial, considered all the applicable regulations, and determined that the petitioners' work qualified for the administrative exemption. (App. 8a-9a). That the facts of this case justified such a conclusion is clear. That the plaintiffs in *Bratt* and *Jones and Associates, Inc.* failed to muster sufficient evidence to fall within the exemption does not preclude such a finding in other cases such as this one. That the DOL has interpreted inconsistently on this issue simply confirms that different fact situations will produce different results. That this trial court correctly applied the law to the facts, but came to a different conclusion than one urged by the petitioners, does not elevate this case to one worthy of review on certiorari.

C. The Professional Exemption Prolonged Course of Specialized Intellectual Instruction and Study

Petitioners also assert that the trial court misinterpreted the requirements of the professional exemption. They argue that once again, the decision of the trial court is out of sync with other decisions. Once again, however, the respondents put on evidence at trial that the petitioners qualified for the exemption.

Petitioners imply that since one cannot obtain a degree in "probation counseling" these petitioners cannot be professionally exempt. This is simply incorrect. In *Martin v. State of Wyoming*, 770 F. Supp. 612 (D. Wyo. 1991), *aff'd*, *Reich v. State of Wyoming*, 993 F.2d 739 (10th Cir. 1993), for example, game wardens were found to be exempt under the professional exemption, despite the fact none of the wardens had degrees in "game wardening." Some did not even have a degree, but had relevant experience. 770 F. Supp. at 614. Many of the game wardens had acquired the knowledge necessary to perform their primary duty through academic study at the college level in such areas as " . . . wildlife management, wildlife biology or a closely related field. . . . " 770 F. Supp. at 614.

Of greatest significance, however, is the fact that the evidence at trial established that the petitioners do fundamentally the same jobs as their counterparts in the Alexandria Social Services Department. In the *Hicks* case, the federal court held the plaintiffs there to be professionally exempt. This was true even though all that Alexandria had required for any newly hired Social Worker was a baccalaureate degree in the field of Human Services, or a

baccalaureate degree in any field plus a minimum of two years experience in an area related to Human Services. In fact, one of the six plaintiff Social Workers in *Hicks* did not have such a degree, but had relevant experience instead. *Hicks, slip op.* (Res. App. 25). Here, all petitioners had college degrees, 88% of the petitioners had related degrees, and all had relevant experience. The trial court's decision in this case reflects a common sense application of the requirements of the professional exemption to the facts before it. Petitioners seek an altogether too narrow reading of the regulations. Nothing could be more illogical than to conclude that these petitioners, who have the same educational requirements and do the exact same work as the *Hicks* social workers, cannot also be deemed exempt professionals. Again, this case does not involve misinterpretation of the law. Rather, this is nothing more than a correct application of the law to the facts, and a judgment with which the petitioners disagree. This is not the type of case that warrants review by this Court.

CONCLUSION

For the reasons stated, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA, *et al.*,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

FRED M. HICKS, et al., Plaintiffs,	)	CIVIL ACTION NO. 92-354-A
v.	)	
CITY OF ALEXANDRIA, Defendant.	)	

MEMORANDUM OPINION

(Filed Mar. 31, 1993)

This is an action brought by thirty-three employees[1] of the City of Alexandria, Virginia ("City") pursuant to the Fair Labor Standards Act of 1938, 29 U.S.C. Section 201 *et. seq.*, as amended ("FLSA"). Plaintiffs seek declaratory, injunctive, and monetary relief, alleging that they are nonexempt employees under the FLSA and are thus entitled to overtime compensation for hours worked in excess of the statutory minimum. *See* 29 U.S.C. Section 207(k) (1992). The City denies liability, claiming that each of these employees is exempt from the overtime requirements of the FLSA pursuant to one of the executive, administrative, or professional exemptions enumerated in the statute. This matter is before the Court for determination of issues relating to liability.[2]

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[1] Twelve Plaintiffs settled their claims with the City of Alexandria prior to trial; thus, at the time of trial, twenty-one Plaintiffs remained.

[2] By order dated June 19, 1992, the liability and damage issues were bifurcated.

I. Background

The Fair Labor Standards Act was made applicable to state and local governments as a result of the United States Supreme Court's 1985 ruling in *Garcia v. San Antonio Metropolitan Transit Authority.*[3] The Act requires that employees be paid time and a half for work over forty hours a week, *see* 29 U.S.C.A. Section 207(a)(1) (1992), but exempts from that requirement "any employee employed in a *bona fide* executive, administrative, or professional capacity." *See id* Section 213(a)(1). To aid employers in classifying their workers, federal regulations provide certain tests, checklists of a sort, enumerating the characteristics of *bona fide* executive, administrative or professional employees who may qualify for exemptions from the statute's overtime requirements.

Subsequent to the *Garcia* decision, the City of Alexandria undertook an extensive study of all its job classifications. This study included a review of a large amount of data compiled from job specifications, employee job-analysis questionnaires, interviews with superintendents, and other sources. The result of the review was the reclassification of each job within the City's employment system as either "exempt" or "non-exempt" from the overtime provisions of the FLSA. Additionally, even after

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[3] 469 U.S. 528, 105 S. Ct. 1005, 83 L.Ed.2d 1016 (1985), *Overruling National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). With respect to state and local government employees, the effective date of FLSA coverage was April 15, 1986 (*See* FLSA amendments of 1985, Pub. Law No. 99-150, Section 2(c)).

the initial review and reclassification, certain job classifications have been reevaluated as a result of changed duties/responsibilities or requests from employees for status reviews.

This action is not the first to stem from the City's ongoing attempts to bring its personnel policies and regulations into conformity with the requirements of the FLSA. In 1989 a number of employees of the City's Fire and Police Departments petitioned this Court to examine their own job classifications to determine whether they had been properly classified as exempt from the FLSA overtime requirements. *See Firefighters Local 2141 v. Alexandria.*[4] In that case, the Court considered argument on many of the same issues presented in the case at hand, and determined certain contested job classifications to be non-exempt and other classifications to have been properly classified exempt. The Court also found that the City had taken sufficient action to begin revision of its administrative regulations, within the "window of opportunity" afforded by the FLSA and its regulations.[5]

The Plaintiffs in this action (the "Employees") are each employed in positions which have been classified by the City of Alexandria as exempt from the overtime provisions of the FLSA. The Employees challenge the classification of their jobs as exempt, claiming that they are not

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[4] 720 F.Supp. 1230 (E.D. Va. 1989), *aff'd* 912 F.2d 463 (4th Cir. 1990).

[5] *See id.* at 720 F.Supp. 1232 (*citing Harkins v. City of Chesapeake*, No. 88-25-N (E.D. Va., Dec. 2, 1988)).

compensated on a salary basis and that their job responsibilities do not meet the standards set forth in regulations implementing the FLSA.

To analyze the job classifications currently at issue, this Court will utilize what is known as the "Short Test" for determining eligibility for exempt status. *See* 29 C.F.R. Sections 541.1(f), 541.2(e)(2), and 541.3(e) (1992).[6] Under the Short Test, an individual qualifies as a *bona fide* executive, administrative, or professional employee if he or she is compensated on a salary basis, at a rate of not less than $250 per week ("Salary Basis Test"),[7] and his or her

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[6] There is also a "Long Test," which enumerates five analysis components; however, the Long Test is utilized in examining job classifications of employees who earn wages of not less than $155 per week. It is undisputed that each Employee earns at least $250 per week. Accordingly, the Regulations allow application of the abbreviated "Short Test" analysis in determining exempt status for certain classifications of employees. *See id* Sections 541.1, 541.2, and 541.3.

[7] With regard to the "salary basis" requirement the federal regulations provide, in part, that:

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to [specified] exceptions . . . , the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule

primary job responsibilities meet various requirements set forth in the regulations ("Primary Duties Test").[8] An

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> that an employee need not be paid for any workweek in which he performs no work.

29 C.F.R. Section 541.118(a) (1992).

The exceptions noted in the above regulation permit the following salary deductions:

> (1) for absences from work for a day or more for personal reasons, other than sickness or accident. *Id.* at Section 541.118(a)(2);
>
> (2) for absences of a day or more occasioned by sickness or disability . . . if the deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation for loss of salary occasioned by both sickness and disability. *Id.* Section at 541.118(a)(3); and
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> (3) for infractions of safety rules of major significance. *Id.* at Section 541.118(a)(5).

Deductions may not be made for employee absences occasioned by jury duty, attendance in court proceedings as a witness, or for temporary military leave. *Id.* at Section 541.118(a)(4).

[8] An employee is considered to work in a bona fide managerial capacity if his primary duties consist of managing the enterprise in which he is employed (or a customarily recognized department or subdivision thereof) and he customarily directs the work of two or more other employees. *See* 29 C.F.R. Section 541.1(f). An employee is considered to work in a bona fide administrative capacity if his primary duties consist of office or non-manual work directly related to management policies or general business operations of the employer and he customarily and regularly exercises discretion and independent judgment. *Id.* at Section 541.2. An employee is considered employed in a bona fide professional capacity if his primary duties consist of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual

employer bears the burden of showing that an employee's job classification meets the requirements of both these analyses in order to prevail on the issue of exemptions. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974).

II. THE "SALARY BASIS REQUIREMENT"

The City claims that the Employees in this action are all paid on a "salary basis," but the Employees claim nonsalaried status under the federal regulations, alleging that they are subject to discipline by pay deductions, including deductions for infractions unrelated to major safety rules; that they are subject to reduced pay when absent from work to appear as witnesses in court cases; and that in certain situations they are subject to reduced pay for absences caused by military service. These allegations, if proved, would defeat the exemptions claimed by the City,[9] unless the alleged deductions were inadvertent, in which case the City need only reimburse the affected employees and promise to comply with regulations in the future in order to continue to claim the exemption.[10]

The parties do not dispute that each Plaintiff Employee receives compensation established on an annual basis, distributed through bi-weekly paychecks in amounts of not less than $250.00 per week. The

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instruction and study and he customarily and regularly exercises discretion and independent judgment. *Id.* at Section 541.3(e).

[9] *See* Footnote 3.

[10] 29 C.F.R. Section 541.118(a)(6) (1992). *See also* Footnote 3, *supra*.

Employees also earn compensatory time, known as "Comp Time," for hours worked in excess of forty hours per week. Comp Time enables an employee to take time off from work, with pay, during times he or she would otherwise be required to work; however, this additional compensation is not considered part of an employee's salary.

The City maintains written policies, governing the use of leave time accumulated by its employees, which have been revised as part of the City's attempts to conform its employment practices with the requirements of the FLSA. Of these policies, the provisions of Administrative Regulation 6-18 are in controversy. This Regulation allows exempt employees to be absent from work for less than one day, for personal reasons, but requires the employees to use accumulated leave time for this purpose. However, if an individual possesses no accumulated leave time, his predetermined salary would not be reduced as a result of an absence of this nature.

Until recently, Administrative Regulation 6-18 also provided that employees would be subject to deductions from salary for absences or suspensions imposed by the City as disciplinary action. However, on August 25, 1992, effective retroactively to March 12, 1989, the City amended Regulation 6-18 to provide that FLSA-exempt employees may not be removed from paid status for disciplinary reasons, except for violations of safety rules of major significance. The new Regulation allows the City to reduce an employee's annual leave as a form of discipline.

While the City admits that under the old Regulation 6-18 it did, in fact, reduce the pay of certain exempt employees as part of disciplinary action not related to significant safety violations, none of the Employees in this action has demonstrated that he or she is one of those individuals. Furthermore, the City has reviewed its employee records in an attempt to identify the individuals for whom such deductions were made, and has issued reimbursement checks as well as an announcement that anyone entitled to such a reimbursement should contact the Personnel Office. None of the Plaintiff Employees has shown any example of an instance where any employee was entitled to, but denied, such reimbursement.

By completing the revision of the disputed portions of Administrative Regulation 6-18, and by taking steps to notify City employees that reimbursement may be obtained for any previous improper deductions related to disciplinary action, the City has demonstrated current compliance with the federal FLSA regulations as well as its intent to comply in the future. These same actions, considered in light of the history behind these proceedings, demonstrate to the satisfaction of this Court that the City has properly taken action within the "window of correction" afforded by the federal regulations.[11]

The City's regulations provide three weeks of paid military leave to its employees, and none of the Employees in this litigation has presented evidence to

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[11] *See Harkins v. City of Chesapeake*, No. 88-25-N (E.D. Va., Dec. 2, 1988) (*cited in Firefighters Local 2141 v. Alexandria*, 720 F.Supp. 1230 (E.D. Va. 1989), *aff'd* 912 F.2d 463 (4th Cir. 1990)).

show that this benefit has been withheld. City regulations also state that no employee will lose pay when serving as a jury member, when summoned to testify at proceedings related to the employee's services with the City, or when he is to appear in a criminal trial either as a victim or a witness. No evidence suggests that the City has disregarded this written policy.

With respect to the Plaintiff Employees' claims that they are subject to reduced pay when absent to appear as witnesses in court proceedings, the evidence adduced at trial fails to support the Employees' position. Douglas Fertig, the City's Director of Personnel Services, did testify that an employee must use personal leave to attend matters of purely private litigation. While neither the federal nor any City regulations address the situation of an employee's absence to attend to matters relating to private personal litigation, the current federal regulations permit the City to require the use of personal leave time for this purpose. *See* 29 C.F.R. Section 541.5d(a) (1992).[12] Prior to the 1991 enactment of Section 541.5d(a), this Court had ruled that an employee taking time off for personal litigation is considered to be attending to personal matters. *Shockley v. City of Newport News*, No. 90-377-NN (E.D. Va. Dec. 18, 1991).[13] In light of the

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[12] This regulation provides that, without jeopardizing the exempt-status of a job classification, public employers may reduce the accrued personal leave of an exempt employee when that employee is absent for periods of less than a day, and, if no such leave is available, the employer may make appropriate salary deductions.

[13] Plaintiff Employees' reliance on *Shockley* is misplaced. That decision was made without the benefit of 29 C.F.R. Section

provisions of Section 541.5d(a), it follows that the City may require a salaried employee to use personal leave to attend to personal litigation without losing the benefit of its exemptions.

For the reasons stated above, the Court finds that all of the Employees in this action are salaried employees. Having determined the "Salary Basis" requirement satisfied with respect to all the Plaintiff Employees, we must next examine the duties and responsibilities of each.

THE "PRIMARY DUTIES" TEST

At trial, certain specified job classifications were disputed by the City and the Employees with respect to eligibility for exempt status on the basis of job functions. The City has claimed three straightforward FLSA exemptions and one combined Administrative/Executive exemption for the various job classifications in dispute.

A. The Executive Exemption

The City claims that the Employees holding the positions of Superintendent of Parks & Facilities Maintenance[14],

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541.5d(a), effective September 6, 1991. Apparently the *Shockley* Plaintiffs filed their claim prior to that date, and that court held that the regulation was not intended to be applied retroactively.

[14] The parties have stipulated that the determination of the exempt status of Plaintiff Lazich, who holds the position of Superintendent of Parks and Facilities Maintenance, will be dispositive of the exempt status of Plaintiff Peregoy's job classification, Assistant Superintendent of Solid Waste.

Employment Training Supervisor[15], Automotive Parts Manager, and Eligibility Supervisor qualify for the Executive exemption to the overtime provisions of the FLSA. In order to demonstrate the executive exemption for any of these jobs, the City must show that these Employees have management as their primary duties.[16] To meet this burden, the City must demonstrate that over half the time spent at work by each Employee is devoted to management of a department or subdivision of the City, and that the work includes the direction of two or more employees therein *or* that the managerial duties performed by the Employee are of special significance.[17]

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[15] Plaintiff Employees stipulated that the duties performed by the Employment Training Supervisor would qualify this job classification for exemption if the Salary Basis Test were met. Since the Court has found all Plaintiffs to be salaried employees, no further analysis is needed for this job classification.

[16] The regulations list examples of work exemplifying "Management." The examples include interviewing, selecting and training employees; directing work; apportioning work among employees; handling complaints and grievances; selecting tools to be used; and providing for safety. *See* 29 C.F.R. Section 541.102(b) (1992).

[17] *Id.* at Section 541.103. Among the factors to be considered in determining whether duties are of special significance are: (1) the relative importance of the managerial duties as compared with other types of duties, (2) the frequency with which the employee exercises discretionary powers, (3) the employee's relative freedom from supervision, and (4) the relationship between the employee's salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor. *Id.*

1. Superintendent Park & Facilities Maintenance

Plaintiffs Michael Lazich and Frederick A. Hicks are Superintendents of Parks & Facilities Maintenance, a subdivision of the City's Recreation Department. Parks & Facilities Maintenance is divided into two Districts. Hicks is the Superintendent of District 1 and Lazich is the Superintendent of District 2. In addition to the testimony of Lazich and Hicks, the court has considered testimony from Moses Simmons, Deputy Director of Recreation & Parks & Cultural Activities for the City.

It is apparent that the job functions performed by these Superintendents include supervisory duties, but in these positions, supervising, while normally an important aspect of management, is not the equivalent of "management" as contemplated by the federal regulations. The duties of this Superintendent position include general supervision of facilities maintenance operations and construction activities. Two work crews, consisting of approximately five employees and a supervisor, are assigned to each District, and the Superintendents assign work to the crews and establish priorities for particular tasks. Actual work is performed under the supervision of Work Crew Supervisors.

Superintendents may interview potential employees and make hiring recommendations, but according to Witness Simmons, Lazich, at least, is not a regular participant on the interview panels which fill vacancies. While the Superintendents may institute discipline of an employee or make recommendations for disciplinary action, Simmons testified that Lazich and Hicks do not have independent authority to suspend subordinates from work

without pay. The Superintendents rate the work performance of the Work Crew supervisors and review performance evaluations of the employees in each of their districts.

The evidence reveals that the Superintendents also spend substantial time doing non-exempt work of the same general type done by non-exempt employees. Witness Simmons testified that Plaintiff Lazich spends most of his time out in the field, occasionally operating machinery, and Lazich testified that he occasionally assists the work crews when there is a shortage of workers. Plaintiff Hicks testified that eighty percent of his work day is spent checking park sites, making field repairs, and checking for complaints. Only twenty percent of Hicks' work day consists of office work such as recording hours worked by his Work Crew and making up work schedules.

Even though these Superintendents direct and apportion work among subordinates and handle complaints, the Court finds that their primary duties do not consist of management, as defined by the labor regulations. Consequently, the City may not claim FLSA exempt status for the position of Superintendent of Parks & Facilities Maintenance.

2. Auto Parts Manager

The Plaintiff Employees allege that Plaintiff Thomas Hammitte, who works as the Auto Parts Manager in the City's General Services Department, is a working supervisor and not an exempt employee, and that therefore this job classification should not be exempt from the overtime

provisions of the FLSA. The court agrees with the Employees' characterization of this position.

Paul D. Schott is the Director of the City's General Services Department, which contains three divisions: Communications, Motor Equipment Division and Property Maintenance. The Motor Equipment Division is further divided into three separate sections: Administrative, Parts, and Service, all three divisions supervised by James Stott, Division Chief for Motor Equipment. The Parts Section in which Plaintiff Hammitte is employed purchases, tracks, stores and distributes all parts and equipment for the maintenance, upkeep and operation of the City's fleet of vehicles.

Just as the Superintendent of Parks and Facilities Maintenance positions analyzed above, the responsibilities of an Auto Parts Manager include supervisory work such as scheduling and handling complaints, and as previously stated, this Court does not find these supervisory responsibilities to be the equivalent of "management" as defined by the federal regulations. Hammitte spends over half his time on such non-managerial duties as taking orders, checking in deliveries, taking inventory, pricing materials and making deliveries. Although he is in charge of day-to-day operations for his section, and he evaluates, trains and disciplines employees, he spends more than half his time at work performing the same tasks as the employees he supervises.

The Service Manager of the Motor Equipment Division, an employee by the name of John Franke, performs duties similar to Hammitte's and receives a salary

approximately equivalent to Hammitte's. Hammitte testified that Franke, whose position is classified by the City as non-exempt from overtime pay requirements, receives compensation of approximately $40,000 per year and is responsible for hiring, training and firing the mechanics in his section. Similarly, Hammitte earns compensation of approximately $41,000 and supervises four employees who earn $18,000-$22,000 per year. The court finds no basis for the difference in status between Hammitte's job and that of the Service Manager, and concludes that the position of Auto Parts Manager is not exempt from the overtime requirements of the FLSA.

3. Eligibility Supervisor

Plaintiff Jo J. Butler is employed as an Eligibility Supervisor in the Eligibility Division of the City's Department of Social Services. The Plaintiff Employees contend that, because an Eligibility Supervisor has no independent managerial control of a separate customarily recognized unit of the City, this position should not be exempt from receiving overtime compensation.

The federal regulations broadly define what constitutes "a recognized department or subdivision" of an employer. The requirement may be satisfied by "a unit with permanent status and function,"[18] and does not require a formal department with a separate budget, contrary to the argument advanced by Plaintiffs. Butler is, in fact, charged with supervision of a permanently assigned unit. The Eligibility Division of the Department of Social

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[18] *See* 29 C.F.R. Section 541.104 (1992).

Services has the function of determining and reviewing whether citizens of the City are eligible for public assistance. The Eligibility Division is further divided into separate sections; Plaintiff Butler works as a supervisor in the Review Section, which itself consists of two Review Units. Each Review Unit has its own supervisor and reviews eligibility for specific public assistance programs.

Butler not only works in a permanently assigned unit, her primary duties consist of the type of management activities contemplated within the federal labor regulations' definition of a *bona fide* executive employee. Butler trains new employees, assigns work to her staff, schedules work hours and approves leave requests, and evaluates the work performance of employees. She participates in the interview process and is also responsible for discipline, having the discretion to issue reprimands and the ability to recommend more severe action. Over fifty percent of Butler's time is devoted to these described activities.

Having found that Butler's job responsibilities meet the requirements of the Primary Duties Test for a *bona fide* executive employee, the Court concludes that the City may claim an Executive Exemption from the overtime requirements of the FLSA for the job classification of Eligibility Supervisor.

B. The Administrative Exemption

The City claims an Administrative Exemption for the following job positions held by Plaintiff Employees: Urban Planner II, Construction Field Representative,

Information Systems Project Leader[19] and Impounding Officer[20]. In order to qualify for this exemption, the major portion of the work performed by a *bona fide* administrative employee must consist of office or non-manual work directly related to management policies or general business operations, and such duties must require the regular exercise of discretion and independent judgment.[21] The regulations attempt to distinguish the administrative operations of an employer from mere production work. To qualify for this exemption, employees need not operate at a level where they formulate management policies; it is sufficient that their work affects policy or that they are responsible for executing or carrying out policy.[22]

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[19] Plaintiffs stipulated that the duties performed by an Information Systems Project Leader would qualify that job classification for exemption if the Salary Basis Test were satisfied. Since the Court has found that all Plaintiffs meet the Salary Basis Test, no further analysis is required for this position.

[20] Plaintiffs stipulated that the duties performed by an Impounding Officer would qualify that job classification for exemption if the Salary Basis requirement were met. As a result of the findings in Section II of this opinion, no further analysis is required for this job classification.

[21] *See* 29 C.F.R. Sections 541.2 and 541.206(a) and (b) (1992).

[22] *Id.* at Section 541.205(c). *See also Firefighters Local 2141 v. Alexandria*, 720 F.Supp. 1230, 1233-34 (E.D. Va. 1989), *aff'd* 912 F.2d 463 (4th Cir. 1990). Examples of administrative-type workers cited in the regulations include credit managers, safety directors, claim agents, analysts, etc.

1. Urban Planner II

Plaintiff Employees allege that the work performed by an Urban Planner II relates directly to production functions and not to the internal management of that worker's department. Plaintiffs further allege that an Urban Planner II does not exercise the level of discretion necessary to be classified as an exempt administrative employee.

Sheldon L. Lynn, the City's Director of Planning & Community Development, and the person responsible for the entire operation of the Department of Planning & Community Development, described the organization of his Department. Planning and Community Development provides analysis, information and recommendations to the City Council, City Manager, and City Planning Commission. Lynn stated that the Department is organized into three divisions: Zoning, Special Projects and Comprehensive Planning, and that there are employees classified as Urban Planner II within each division.

The evidence at trial demonstrates that the primary duties of a Planner II consist of activities directly related to formulation of City policies and decisions. Plaintiff Ronald Yake testified that he works as an Urban Planner II in the Special Projects Division,[23] and that his responsibilities include reviewing applications for rezonings and special use permits, and, when directed, performing

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[23] The parties have stipulated that the determination as to whether an Urban Planner II qualifies for FLSA exempt status is to be based on Ronald Yake's performance of the duties of an Urban Planner II. Plaintiffs Ronald Yake, Ron Johnson and Van Slaymaker are each employed by the City as Urban Planners II.

special studies pertaining to the zoning ordinances or zoning regulations. He estimated that he spends approximately eighty-five percent of his time working on zoning code text amendments, rezoning applications and residential cluster applications, and that a very low percentage of his total work time is spent going to City Council meetings and making reports.

Sheldon Lynn also described the duties of a Planner II in his testimony, stating that within the Special Projects Division, an Urban Planner II handles applications for rezoning and cluster development as well as proposed amendments to the zoning code, reviewing such applications and proposals and independently preparing analyses and reports for the Director's review. The Planner's reports are ultimately utilized in preparing recommendations to the Planning Commission, which, in turn, makes recommendations to the City Council.

Thus the position of Urban Planner II has, as its primary function, the duty of performing analyses for the purpose of advising management, in this case the Director of the Department himself. The Planner's findings and analyses are utilized in providing advice to the City Council, and may ultimately result in a change or implementation of policy.

In support of his contention that the Planner II position does not entail a level of discretion sufficient to qualify it for an Administrative Exemption, Yake stated that his duties include no supervision and that all his written recommendations require approval from his Department Director as to content as well as form. It is true that the Director of Yake's Department has final

authority to approve or disapprove Yake's recommendations; however, according to the federal regulations, recommendations for action may themselves suffice as decisions requiring an exercise of discretion and independent judgment.[24] In addition, Yake's claim that he has no independent exercise of discretion and cannot speak for his Department or the City is not a persuasive factor in the Court's analysis of this classification. The very essence of Yake's duties is the provision of recommendations for action and, accordingly, the Court finds that the City has properly claimed an Administrative Exemption for the job classification Urban Planner II.

2. Construction Field Representative

Plaintiff Anthony Hinz is employed in the City's General Services Department as a Construction Field Representative. Just as with the Urban Planner II position, Plaintiff Employees contend that the City's Construction Field Representative should be classified as non-exempt for receipt of overtime pay, alleging that this

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[24] The regulations provide:

> The term "discretion and independent judgment" as used in the Regulations . . . does not necessarily imply that the decisions made by the employee must have a finality that goes with unlimited authority in a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for actions rather than the actual taking of action.

29 C.F.R. Section 541.207(e) (1992).

Employee lacks discretion in the performance of his duties.

The federal regulations recognize that planning, negotiating contracts, representing the employer, and business control are all administrative operations. *See* 29 C.F.R. Section 541.205(b) (1992). These functions accurately describe the duties performed by the City's Construction Field Representative. Plaintiff Hinz testified that he inspects and supervises construction projects, administers contracts to ensure construction in compliance with contracts, plans and specifications, and that he ensures compliance with City Code regulations and industry standards. He testified that he carries out his duties with little direct supervision.

Hinz not only acts as the City's representative in communications with the contractors, he also negotiates change orders to contracts and inspects projects to assure that work is performed to the City's satisfaction. He has supervised City construction projects ranging from several thousand to $1.5 million dollars. While Hinz does not always have final authority to commit the City to specific positions on particular contracts, throughout the course of a project his recommendations are given particular weight by the Director of the Department of General Services. As discussed in connection with the Planner II job classifications, the responsibility of making recommendations for action may itself require the exercise of significant discretion and independent judgment.

The duties of the Construction Field Representative constitute the type of administrative work contemplated by FLSA regulations as being directly related to the City's

management policies or general business operations. This Court finds that the City's job classification of Construction Field Representative merits an Administrative Exemption from the overtime requirements of the FLSA.

C. Professional Exemption: Social Worker I and II

Plaintiff Matthew Thomas is employed as a Social Worker I in the City's Department of Human Services. Plaintiffs Margaret Dhillon, David McCreedy, Bette Smith, Colby Hatch, and Joann Gray are each employed as a Social Worker II at the City's Department of Human Services. The City claims a Professional Exemption from the FLSA overtime requirements for the job classifications of Social Worker I and Social Worker II. To prevail on its claim for these positions, the City must show that these Employees spend the major portion of their time performing work which requires advanced knowledge in a field of science or learning and the consistent exercise of discretion and judgment.[25]

The City has met its burden to demonstrate that personnel employed as Social Worker I and Social Worker II spend the majority of their time at work engaged in duties which consistently require the exercise of discretion and independent judgment. There was testimony from Terrence Lee Robinson, the Division Chief for Classification & Compensation in the City's Personnel Department, that each of these Social Workers reports to a supervisor, but he emphasized that the positions also

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[25] *See* 29 C.F.R. Section 541.3 and 541.305(1992).

entail substantial independence. There can be little dispute that the discretion afforded to these employees is substantial; one example among many is the fact that they have the independent authority to remove children from their homes. Each Social Worker carries a large case load, 40-60 cases, and most of their work is done in the field, without immediate supervision.

The daily duties of a Social Worker I include such tasks as providing counseling and therapy to individuals and families, providing social assessments, crisis intervention for evicted, homeless, or other displaced individuals, arranging and monitoring foster care placements, and providing treatment to emotionally disturbed adults and children.

Margaret Dhillon, a Social Worker II, testified that her own unit is called an Intake Unit and that the majority of cases received by a Social Worker II are complaints of child abuse and neglect. She further testified that her unit also handles some foster care and some family service cases. The day-to-day duties of a Social Worker II generally include the following: preparation of social histories, psychosocial diagnoses and treatment plans; providing therapy to individuals, families and groups; providing crisis intervention; continuous 24 hour on-call service; determining disposition of abuse and neglect complaints; testifying for the Department in civil and criminal court proceedings; emergency removal of children from their homes; training and supervision of foster parents, and responsibility for complex foster care cases which may require termination of parental rights and considerable court involvement.

Aside from indicating the level of discretion attributable to a City Social Worker, the duties described above necessarily require each Social Worker to have advanced knowledge and training in the social sciences. Plaintiff Dhillon testified extensively about the various types of knowledge essential to the work performed by the City's social workers, and stated that such knowledge is customarily acquired by these workers through a prolonged course of university level study or its equivalent. Dhillon testified that her work as a Social Worker II requires knowledge of normal and abnormal psychology, child development, mental retardation, social problems, therapeutic treatment techniques, alcoholism, child delinquency, drug addiction, theories of human behavior, knowledge of group behavior and knowledge of literature in the field of social work.

The federal regulations define the term "professional" to include individuals engaged in professions having a recognized status and in which professional knowledge is normally acquired through a course of prolonged study, referring to such pursuits as "learned professions."[26] According to the FLSA regulations,

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[26] *See* 29 C.F.R. Section 541.301(1992). A learned profession requires advanced knowledge in a field of learning customarily acquired by a prolonged course of specialized intellectual instruction and study. *Id.* Section 541.302(a). This "field of study" requirement distinguishes a profession from an occupation which mereiy requires a "general academic education coupled with a subsequent apprenticeship or from training in the performance of routine mental, manual or physical processes," *Id.* and also "serves to distinguish the professions from the mechanical arts." *Id.* at Section 541.302(c). The requirement that the knowledge be of an advanced type

possession of an advanced educational degree is the best evidence that an employee does in fact meet the educational and training requirements contemplated by this Exemption.[27] An advanced degree, however, may not be the only acceptable evidence of the requisite learning and training for this job classification.

Since August of 1990, the City has required that any person newly hired as a Social Worker I, or newly hired or promoted to Social Worker II, must possess a baccalaureate degree in the field of Human Services, or a baccalaureate degree in any field plus a minimum of two years of experience in an area related to Human Services. With the exception of one Plaintiff Employee, all the individuals currently employed by the City as Social Worker I or II possess the requisite educational background. The single employee who does not meet this educational requirement possesses extensive experience as a social worker with the City, and in this court's opinion, that Employee's relevant and valuable experience is the equivalent of the educational backgrounds of the other Social Workers.

There is an ongoing debate about whether social work qualifies as a learned profession. Suzanne Chis, Director of Social Services for the City, and who manages

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means that generally it is knowledge which cannot be obtained at the high school level. *Id.* at Section 541.302(b).

[27] "The typical symbol of the professional training and the best prima facie evidence of its possession is, of course, the appropriate academic degree, and in these professions an advanced academic degree is a standard (if not universal) prerequisite." *Id.* at Section 541.302(e)(1).

the public assistance programs, testified there are professional associations for social workers, which might indicate a certain recognized status, but she also testified that there are no national licensing procedures. Colleges and universities offer undergraduate and graduate degrees in social work, a fact which would support the proposition that social work is a recognized field of learning; but this, alone, is insufficient evidence that social work is a profession contemplated by the federal regulations as meriting an exemption from overtime pay. However, when considered in light of the proven qualifications and training possessed by each of the Plaintiff Employees, the Court finds that the duties performed by the Social Workers I and II consist of work requiring advanced knowledge in a field of science and learning, of a type normally acquired through a course of prolonged study, and that the job classifications of Social Worker I and Social Worker II have been properly classified by the City as exempt from the overtime requirements of the FLSA.

D. Executive/Administrative Combination Exemption

The City claims a combination Executive/Administrative exemption for its Supervisory Secretary III position. The federal regulations permit an employee to be exempted from the overtime requirements of the FLSA if they qualify for a "combination exemption" such as the one asserted by the City for this job classification.[28] At

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[28] A "combination exemption" combines the tests for executive, administrative, and professional employees into a

trial, Plaintiff Employees stipulated that the duties performed by Supervisory Secretary III employees would qualify that position for FLSA-exempt status should it be found to meet the Salary Basis Test. Since the Court has found that all the Plaintiff Employees are salaried, the Court further finds that the Supervisory Secretary III classification qualifies for a combination Executive/ Administrative exemption from the overtime requirements of the FLSA.

III. SUMMARY

The City has met its burden to demonstrate that, with respect to the job classifications of Employment Training Supervisor, Eligibility Supervisor, Urban Planner II, Construction Field Representative, Supervisory Secretary III, Information Systems Project Leader, Impounding Officer, Social Worker I and Social Worker II, its personnel policies and procedures do, in fact, comply with federal regulations implementing the Fair Labor Standards Act. Having demonstrated that each of those job classifications satisfies the requirements for an executive, administrative, or professional exemption from the requirements of the FLSA, the City need not pay overtime to the Employees working in these positions.

The Plaintiff Employees working for the City as Superintendents of Parks & Facilities Maintenance and Automotive Parts Manager have been improperly classified by the City as exempt from the overtime provisions of the Fair Labor Standards Act. The Court finds that

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special set of requirements. *See* 29 C.F.R. Section 541.600 (1992).

their primary duties do not consist of "management" as required by the FLSA regulations. Accordingly, the Plaintiff Employees working in these positions are entitled to receive overtime compensation.

The Court will issue an order entering judgment in favor of the City of Alexandria with respect to all disputed job classifications except Superintendent of Parks & Facilities Maintenance, Auto Parts Manager, and Assistant Superintendent of Solid Waste. Additionally, the Court will issue an appropriate order to schedule further proceedings on damage issues relating to the Plaintiff Employees holding the latter three positions.

/s/ W. Curtis Sewell
W. Curtis Sewell
U. S. Magistrate Judge

March 31, 1993
Alexandria, Virginia

* * *

[p. 122] Q DYFS did not exist prior to 1990, correct?

A Not as a separate agency, no. We were part of Department of Corrections.

* * *

Q Now, based upon your examination of those personnel files and the PMIS system, did you determine how many probation counselors who had been hired since July 1, 1989 had a college degree, and if so, how many of those had a college degree in a related field?

A All of them had a college degree with one exception that I wasn't able to determine. This particular employee listed a certificate from an institution in Africa which I'm not familiar with. They did list it as a degree, I believe it was in education psychology, but they called it a certificate.

Q Now, did you perform a review of all the [p. 123] records you've already described to determine the experience that all the plaintiffs had prior to becoming employed by the Department of Youth and Family Services, or the Department of Corrections as it preceded the department?

A Yes.

Q And based on your analysis, what did you find insofar as experience of the plaintiffs, whether it was related or not?

A I found that all plaintiffs have related experience with one exception.

Q And what was that one exception?

A The application was somewhat incomplete. I reviewed a resume' and did see one indication of some experience working with youth, but it was not explained to the point that I could determine the extent of that experience. I was not able to check it out with the court service director, because he is since deceased.

Q Now, when you're saying related experience, would you please tell the court what you mean by related experience?

A I'm talking about positions such as having been a social worker, having been a mental health worker, a mental health therapist, a counselor.

* * *

[p. 148] Q Do all of your people possess the credentials necessary to be qualified to go to work in the city's social services department?

A Yes.

Q Ms. Brooks, are you familiar with the kind of stuff that a social services worker has to know in order to be able to do his or her job as a social services worker?

A Yes. They have to know the principles of family counseling and dealing with troubled youth in families. They have to know about substance abuse. They have to know about special education, corrections, control, abnormal psychology and just anything related to those areas. And they have to know about treatment modalities and resources in the [p. 149] community.

Q Is that basically the same stuff your people have to know to do their job?

A Yes.

Q Are you familiar with anything the social services workers need to know that one doesn't have to know to be a probation counselor in Alexandria?

A I'm really not familiar with anything that comes under that category.

Q Are the two positions functionally substantially similar or equal?

A Yes, I believe so.

MR. DAVIS: I don't have any other questions, Your Honor.

THE COURT: Cross-examine?

CROSS-EXAMINATION BY MR. LEIBIG:

Q Did you just say that you believe that the position of a juvenile probation officer and a social worker, you are referring to a social worker two or a social worker one, are identical?

A I'm referring to both positions.

[p. 150] Q So you're saying that a juvenile probation officer – I want to make sure that this is clear. A juvenile probation officer's functions and duties and background and everything is the same as a social worker two employed by the Department of Human Services in Alexandria?

A A social worker two has more experience, but that's the only difference.

Q But their work's the same?

A They have essentially the same functions and knowledge and skills, yes.

* * *

[p. 34] Q Are you personally familiar at all with how individual court service units approach the issue of discipline with their employees?

A No.

Q And in fact you don't know, do you, whether at any individual court service unit the probation officers are treated as subject to being disciplined by being put out on the street without pay?

A No, I don't know.

Q You just don't know any of those things, do you?

A No. The state has a broad policy with [p. 35] regard to discipline, and it's up to each agency to implement those broad policy guidelines.

* * *

Opinion Letter No. 1344 (WH-292). October 8, 1974.

Fair Labor Standards Act

We regret the delay in replying to your letters of June 27, and July 3, 1974, concerning the exempt status under the Fair Labor Standards Act of various classes of employees of. . . . County.

The descriptions of the educational requirements and the duties and responsibilities of Public Defender Investigators II, and III submitted with your letter of June 27, 1974, would meet the conditions for exemption as administrative employees under Regulations, Part 541.2, where such employees are paid in accordance with the salary tests specified in the Regulations (copy enclosed). While the salaries outlined in your letter meet the salary tests contained in the current regulations, your attention is directed to the enclosed excerpt from the Federal Register of August 16, 1974, which proposes an interim increase in the salary rates for administrative employees to $160 a week and to $300 a week for the special high salary provisions.

With regard to the Deputy Probation Officers II and III listed in your letter of July 3, 1974, you are advised that based on the job descriptions submitted, they would meet the conditions for exemption as an administrative employee under Regulations Part 541.2.

It should be pointed out, however, that it is questionable whether Estate Investigators and Public Defender Investigators I whose duties are closely supervised by a superior would meet the independent discretion and judgment test or would spend at least 80% of their time

worked in duties at the level contemplated by the exemption.

With regard to your concern over the provisions of section 7(k) of the Act, you are advised that this section only provides an alternative method of paying premium overtime compensation for certain employees in fire protection activities or law enforcement activities – it does not negate the use of the exemption in Section 13(a)(1) for employees who meet the duty, responsibility and salary tests contained in Regulations Part 541.

At the present time regulations defining the term "law enforcement personnel" are being drafted. However, we are not prepared to state that probation officers would come within the definition of this term.